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No. 82-1227

IN THE

Supreme Court of the United States

October Term, 1982

KENNETH FORBES,

Petitioner,

vs.

ROBERT C. NEWMAN, II,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. May Petitioner seek review of a purported federal question in a state court matter where (a) a demurrer to the Petitioner's complaint has been substantially overruled and further proceedings in the trial court are contemplated; and (b) the purported federal question does not otherwise qualify as a "final" judgment for purposes of this Court's jurisdiction under 28 U.S.C. § 1257?

2. Should *Miranda v. Arizona* (1966) 384 U.S. 436 be extended to require a private psychotherapist to give *Miranda* warnings to his patients before beginning private treatment sessions in a non-custodial, non-interrogatory setting?

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IN THE

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KENNETH FORBES,

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vs.

ROBERT C. NEWMAN, II,

Respondent.

Respondent Robert C. Newman, II hereby opposes the Petition for Writ of Certiorari of Kenneth Forbes seeking review of the opinion of the California Court of Appeal. That opinion is unreported and is reproduced in the Appendix to Forbes' Petition.

Summary of Argument.

The Statement of the Case in Forbes' Petition is generally accurate. However, it should be noted that the decision of the California Court of Appeal overruled a demurrer to and remanded for trial six causes of action for negligence, intentional infliction of emotional distress, invasion of Forbes' state and federal constitutional right of privacy, and violation of Forbes' state and federal civil rights. The operative complaint is reproduced as Appendix A to this Brief.

By his Petition, Forbes has asked this Court to extend the *Miranda* doctrine to require a private psychotherapist to give *Miranda* warnings to his patients in anticipation of statements they might make during therapy which the psychotherapist would be obliged by statute to report to the

authorities. Forbes' Petition should be denied because (1) the issue Forbes now raises lacks finality for purposes of 28 U.S.C. § 1257; and (2) there is no justification for extending the "custodial interrogation" rationale of *Miranda* to every interaction between psychotherapist and patient since the patient is in no sense "in custody" and, therefore, is subject to none of the coercive effects which motivated *Miranda's* warning requirements.

REASONS FOR DENYING THE WRIT.

A. THE PURPORTED FEDERAL ISSUE PRESENTED IN THIS COURT IS NOT FINAL FOR PURPOSES OF 28 U.S.C. § 1257. AS A CONSEQUENCE, FORBES' PETITION IS JURISDICTIONALLY DEFECTIVE.

In general, a state court judgment that contemplates further proceedings on remand is not final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257. (*E.g., Flynt v. Ohio* (1981) 451 U.S. 619, 620-621.) In particular, "the overruling of a demurrer . . . is not [ordinarily] a 'final' judgment." (*Pope v. Atlantic Coast Line R. Co.* (1953) 345 U.S. 379, 382.)

There are, of course, exceptions to this rule: "In *Cox Broadcasting Corp. v. Cohn* [1975] 420 U.S. 469 . . . this Court identified four categories of cases in which a state court's decision of a federal issue had been treated as a final judgment even though additional proceedings in the state trial court were anticipated." (*Minnick v. California Dept. of Corrections* (1981) 452 U.S. 105, 121.) Briefly, those categories are: (1) cases where the federal question is dispositive of the litigation; (2) cases where the federal question will survive further litigation regardless of the outcome; (3) cases where later review of the federal question is precluded; and (4) cases where failure to immediately review the federal question would seriously impair an important federal policy. (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 479-483.)

As explained herein *infra*, the decision below does not fall within any of these categories and, as a result, Forbes' Petition is jurisdictionally defective.

1. The Purported Federal Issue Is Not Dispositive of the Litigation.

Even if Forbes is permitted by this Court to pursue the claims founded upon his "duty to warn" theory, the decision below guarantees him the right to proceed to trial on

six alternative causes of action, any one of which could afford him complete relief. As a result, this is not a case within the first category of exceptions to the finality rule where "there are further proceedings — even entire trials — yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 479.)

2. The Purported Federal Issue Will Not Necessarily Survive Further State Court Proceedings.

Each cause of action in which Forbes asserts a violation of his constitutional rights invokes the California as well as the federal constitution. Therefore, the ultimate decision of this case could easily rest upon an adequate and independent non-federal ground as to which this Court will not take jurisdiction. (*E.g., Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, 568; *Radio Station WOW, Inc. v. Johnson* (1945) 326 U.S. 120, 129.) Similarly, the six causes of action reinstated by the decision below raise several additional potential federal questions (*e.g.*, invasion of privacy, violation of federal civil rights statutes) which may be dispositive of the litigation and, in any event, call for abstention by this Court until the entire litigation is concluded. (*E.g., Republic Natural Gas Co. v. Oklahoma* (1948) 334 U.S. 62, 71-72.) In short, this is not a case within the second category of exceptions to the finality rule where "the federal issue . . . will survive and require decision regardless of the outcome of further state court proceedings." (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 480.)

3. Later Review of the Purported Federal Issue Will Not Be Precluded by Further Proceedings on the Remaining Issues.

In the event that Forbes does not prevail on his remaining six causes of action he may seek further review in this Court. Review at that time of the purported federal issue raised herein will not be precluded even if the California Supreme Court refuses in the second appeal to consider the purported federal issues decided on the first appeal. (*E.g., Reece v. Georgia* (1956) 350 U.S. 85, 87; *Urie v. Thompson* (1949) 337 U.S. 163, 172-173.) In short, this is not a case within the third category of exceptions to the finality rule where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 481.)

4. There Is No Federal Policy Which Would Be Frustrated by a Refusal to Review the Purported Federal Issue Before Trial on the Remaining Issues.

As explained below in greater detail, there is no federal policy of which we are aware requiring *Miranda* warnings in a non-custodial environment not involving any interrogation. This case, therefore, does not fall within the fourth exception to the finality rule where "a refusal immediately to review the state court decision might seriously erode federal policy. . . ." (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 483.) As explained in *Flynt v. Ohio, supra*, 451 U.S. at 622:

> "The resolution of this question can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth exception to swallow the rule. Any federal issue finally decided on an interlocutory appeal in the state courts would qualify for immediate review."

B. THERE IS NO JUSTIFICATION FOR REQUIRING A PRIVATE PSYCHOTHERAPIST TO GIVE MIRANDA WARNINGS TO HIS PATIENTS.

The gravamen of Forbes' Petition is that because medical practitioners, such as Dr. Newman, have a duty under California law to report known or reasonably suspected instances of child abuse to an appropriate child protective agency, persons under the care of such practitioners are entitled to *Miranda* warnings in advance of their treatment. Forbes' only citation in support of this novel theory is this Court's decision in *Estelle v. Smith* (1981) 451 U.S. 454. In *Estelle*, this Court concluded, *inter alia*, that "when faced *while in custody* with a *court-ordered* psychiatric inquiry, respondent's statements to [a psychiatrist] were not 'given freely and voluntarily without any compelling influences' . . ." in the absence of *Miranda* warnings prior to the psychiatric interview. (451 U.S. at 469; emphasis added.) *Estelle* thus requires only that "*custodial interrogation* by a *court-appointed* psychiatrist must be treated the same as a custodial interrogation by a police officer or prosecuting attorney for the purpose of determining the applicability of *Miranda*." (*Battie v. Estelle* (5th Cir. 1981) 655 F.2d 692, 698 (citation omitted; emphasis added).)

That the holding in *Estelle* is inapplicable to the case at bar is apparent. Forbes does not and could not allege either that he was in custody at the time he revealed what Dr. Newman suspected to be an instance of child abuse or that the statements he made in the private, voluntary psychotherapy session between himself and Dr. Newman were in any way the product of a "custodial interrogation." There is, therefore, no basis upon which to invoke the *Miranda* doctrine.

See, *e.g.*:

State of Rhode Island v. Innis (1980) 446 U.S. 291, 301 ["the Miranda safeguards were designed to vest a *suspect in custody* with an added measure of *protection against coercive police practices* . . . ." (emphasis added)];

Beckwith v. United States (1976) 425 U.S. 341, 346 ["*Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of . . . in-custody interrogation,' " (citation omitted)];

United States v. Mueller (5th Cir. 1975) 510 F.2d 1116, 1117-18 ["The fallacy of this argument is that the appellant was not in custody at the time he admitted the wrongdoing. . . . [T]he admissions emerged during the course of an 'informal conversation.' The investigating agent was not a police officer and had no authority to arrest. Mueller was at liberty to depart at any time or to withhold whatever information he desired."].

The California Court of Appeal has squarely addressed the issue presented by Forbes' Petition and reached the same conclusion with respect to statements made to a physician in a hospital emergency room. In *People v. Salinas* (1982) 131 Cal.App.3d 925, 182 Cal.Rptr. 683, the court noted that if *Miranda* were extended to the host of medical practitioners and other social welfare workers covered by California's child-abuse reporting statutes, the rationale underlying *Miranda* would be distorted beyond recognition:

"The second policy consideration is that the old and new reporting statutes require a broad spectrum of people (from social workers and summer day camp

administrators to physicians and dental hygienists)[*] to report child abuse to the named agencies. If we were to require Dr. Carroll to give *Miranda* warnings in this case, then we would be compelled to hold the other people specified above to be police agents under the statute. *Miranda* would be extended far beyond whence it came, *i.e.*, custodial interrogation by the police." (131 Cal.App.3d at 942; 182 Cal.Rptr. at 692-693.)

Conclusion.

For the reasons stated herein, the Petition for Writ of Certiorari of Kenneth Forbes should be denied.

Respectfully submitted,

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*See California Penal Code sections 11165(h), (i), and (j) reproduced as Appendix B to this Brief.

EXHIBIT A.

Third Amended Complaint for Damages.

Superior Court of the State of California for the County of San Bernardino.

Kenneth Forbes, an individual, Plaintiff, vs. Robert C. Newman, II, an individual; and Does 1 through 10 inclusive, Defendants. Case No. 199833.

THIRD AMENDED COMPLAINT FOR DAMAGES.

1. Negligence;
2. Intentional Infliction of Emotional Distress;
3. Invasion of Privacy;
4. Civil Rights.

SUMMONS ISSUED

Plaintiff, KENNETH FORBES, alleges as follows:

FIRST CAUSE OF ACTION

(Negligence — failing to act reasonably to maintain the confidentiality of the psychotherapist-client relationship)

1. Plaintiff is, and at all times material hereto was, a resident of the County of San Bernardino, State of California.

2. Defendant is, and at all times material hereto was, a resident of the County of San Bernardino and is a psychologist licensed by the State of California.

3. Plaintiff, KENNETH FORBES, is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through 10, inclusive, and therefore sues these Defendants by such fictitious names. The Plaintiff will amend this Complaint to set forth their true names and capacities when the same have been ascertained. The Plaintiff is informed and believes, and thereon alleges, that each of said fictitiously named Defendants is negligent and responsible in some manner for the occurrences herein alleged

and that Plaintiff's damages as herein alleged were proximately caused by said negligence and conduct.

4. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, the Defendants, and each of them, were the agents and/or employees, coventurers, partners, or in some manner agents and/or principals for each other and acting within the course and scope of said agency and/or employment.

5. On or about April 2, 1979, Plaintiff engaged the fiduciary services of the Defendant for therapy and confidential counseling. Plaintiff, relying on the fiduciary relationship between himself and Defendant that all conversations with the Defendant would be held strictly confidential and privileged, made personal and confidential disclosures to the Defendant.

6. The Defendant, acting in his professional capacity, owed the Plaintiff a duty of care to act reasonably to maintain the confidential and fiduciary relationship between himself and Plaintiff.

7. On or about November 14, 1980, Plaintiff learned for the first time that the Defendant had negligently breached the aforesaid duty by failing to act reasonably to maintain the confidentiality of their relationship in that: (1) the Defendant unreasonably, without just cause and without right, reported to the Sheriff's Department of San Bernardino County and to the County Child Protective Services a confidential disclosure made to Defendant by the Plaintiff, and (2) by wrongfully characterizing said disclosure as a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Exhibit "A" attached.

8. As a direct and proximate result of the aforesaid negligent conduct of Defendant, Plaintiff was tried and acquitted in a criminal prosecution; had the custody of his

children wrongfully taken from him, suffered injury to his health, strength and activity, sustained severe shock, personal and public disgrace and humiliation, loss of family, friends and occupation, and injury to his nervous system, personal and mental processes, all of which injuries have caused and continue to cause Plaintiff great mental, physical and emotional distress and suffering and have resulted in permanent injuries and disability, all to his general damage.

9. As a further direct and proximate result of the aforesaid negligence of said Defendant, Plaintiff was put to great medical expense in connection therewith, the exact amount of such expenses is unknown to said Plaintiff at this time and he will ask leave of Court to prove same, and if required, to amend this Complaint to show the reasonable value thereof to the date of trial and in addition thereto, further additional medical expenses.

10. As a further and proximate result of the aforesaid negligence of the Defendant, the Plaintiff was prevented from attending to his usual occupations and thereby had loss of earnings in an amount presently unascertained. The Plaintiff is informed and believes, and on said information and belief, alleges that he will thereby be prevented from attending to said usual occupation for a period in the future which he cannot ascertain and will thereby sustain further loss of earnings, all to his damage.

SECOND CAUSE OF ACTION

(Intentional Infliction of Emotional Distress — due to intentional breach of confidential relationship)

11. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 6, inclusive, of the FIRST CAUSE OF ACTION, as if the same were separately set forth herein.

12. On or about November 14, 1980, Plaintiff learned for the first time that Defendant intentionally and fraudulently breached his duty to act reasonably to maintain the confidentiality of his relationship with Plaintiff by intentionally and wrongfully sending a letter to the Sheriff's Department of San Bernardino County and the County Child Protective Services with the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

13. Defendant fraudulently intended that Plaintiff make confidential disclosures in reliance on the confidentiality of their relationship; that Defendant's intentional and wrongful reporting aforesaid was malicious and fraudulent conduct intended to inflict emotional distress and to oppress the Plaintiff thereby entitling him to exemplary damages.

14. As a direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

THIRD CAUSE OF ACTION

(Invasion of Privacy — negligently failing to act reasonably)

15. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 7, inclusive, of the FIRST CAUSE OF ACTION as if the same were separately set forth herein.

16. As a citizen not in the public light, Plaintiff has a right to privacy as guaranteed by the Constitutions of the United States and the State of California and the Defendant owed the Plaintiff the duty to act reasonably so as to protect this right of privacy, which Plaintiff never intended to surrender.

17. Defendant negligently breached his duty to act reasonably to maintain the confidentiality of his relationship with Plaintiff and to protect Plaintiff's right of privacy by wrongfully sending a letter to the Sheriff's Department of San Bernardino County and the County Child Protective Services with the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

18. Defendant knew that Plaintiff had made this disclosure in reliance on the confidentiality of the relationship between them, thus Defendant's reporting of Plaintiff's personal disclosures made in the course of therapy constitutes a negligent invasion of Plaintiff's right of privacy as guaranteed by the Constitutions of the United States of America and the State of California.

19. As a direct and proximate result of Defendant's negligent invasion of Plaintiff's privacy, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

FOURTH CAUSE OF ACTION

(Intentional Invasion of Privacy)

20. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 7, inclusive, of the FIRST CAUSE OF ACTION and Paragraph 16, inclusive, of the THIRD CAUSE OF ACTION as if the same were separately set forth herein.

21. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to act reasonably to maintain the confidentiality of his relationship with the Plaintiff and to protect the Plaintiff's right of privacy when Defendant wrongfully sent a letter to the Sheriff's Department of San Bernardino County

and to the County Child Protection Services with the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

22. Defendant knew that the Plaintiff had made his disclosure in reliance on the confidentiality of the relationship between them and knew that Plaintiff never intended to surrender this confidentiality and the Plaintiff's right to privacy; and further, Defendant's intentional conduct aforesaid in breaching the Plaintiff's right to privacy was malicious and fraudulent conduct intended to oppress the Plaintiff, thereby entitling him to exemplary damages.

23. As the direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

FIFTH CAUSE OF ACTION

(Violation of civil rights by failing to act reasonably)

24. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 6, inclusive, of the FIRST CAUSE OF ACTION as if the same were separately set forth herein.

25. As a parent, Plaintiff's interest in the care, custody and companionship of his children is a fundamental civil right, guaranteed by the United States Constitution, the California Constitution and the Federal Civil Rights Acts.

26. Defendant owed the Plaintiff the duty to act reasonably so as not to violate the Plaintiff's civil rights.

27. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had negligently breached his duty to act reasonably to protect Plaintiff's civil rights when Defendant wrongfully sent a letter to the Sheriff's Department of San Bernardino County and to the County

Child Protective Services containing the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

28. As the direct and proximate result of Defendant's negligent conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as specifically set forth herein.

SIXTH CAUSE OF ACTION

(Intentional Violation of Civil Rights)

29. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 6, inclusive, of the FIRST CAUSE OF ACTION and Paragraph 26, inclusive, of the FIFTH CAUSE OF ACTION, as if the same were separately set forth herein.

30. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to act reasonably to protect the Plaintiff's civil rights when Defendant wrongfully sent a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services with the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

31. Defendant knew that Plaintiff had made his disclosures in reliance on the confidentiality of the relationship between them and knew that Plaintiff never intended to surrender this confidentiality and the Plaintiff's civil rights; and further, Defendant's conduct aforesaid in intentionally violating Plaintiff's civil rights was malicious and fraudulent conduct intended to oppress the Plaintiff, thereby entitling him to exemplary damages.

32. As the direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the dam-

ages set forth in Paragraphs 8, 9 and 10, inclusive of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

SEVENTH CAUSE OF ACTION

(Negligence due to Defendant's failure to warn Plaintiff)

33. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, as if the same were separately set forth herein.

34. The Defendant, acting in his professional capacity, owed Plaintiff a duty of care to warn the Plaintiff of any exceptions to the confidentiality of their psychotherapist/client relationship, including:

(1) a warning that Defendant could and would report any confidential disclosures to the authorities if the Defendant felt obliged to do so and that such disclosures could be used against him;

(2) a warning concerning the applicable law relating to such disclosures; and

(3) a warning that certain disclosures made by Plaintiff to Defendant could result in criminal and civil proceedings against the Plaintiff.

35. On or about November 14, 1980, Plaintiff learned for the first time that Defendant negligently breached his duty to warn Plaintiff, as set forth in Paragraph 34, by failing to so warn Plaintiff.

In addition, and because the Defendant failed to warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosure Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff

disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

36. That as a direct and proximate result of Defendant's negligent conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

EIGHTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress — based on intentional failure to warn)

37. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION, as if the same were separately set forth herein.

38. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION, by intentionally failing to so warn the Plaintiff.

In addition, and because the Defendant intentionally failed to so warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid and which disclosure Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

39. Defendant knew that Plaintiff had made his disclosures in reliance on the confidentiality of the relationship between them and also knew that if Defendant had warned the Plaintiff as described in Paragraph 34 of the SEVENTH

CAUSE OF ACTION that Plaintiff never would have made any disclosures of a confidential nature; that Defendant's intentional failure to warn and wrongful reporting aforesaid was malicious and fraudulent conduct intended to inflict emotional distress and to oppress the Plaintiff thereby entitling him to exemplary damages.

40. As the direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

NINTH CAUSE OF ACTION

(Invasion of Privacy — failure to warn)

41. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, Paragraph 16, inclusive, of the THIRD CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION, as if the same were separately set forth herein.

42. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had negligently breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION by negligently failing to so warn the Plaintiff.

In addition, and because the Defendant negligently failed to warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosures Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Said

negligent failure to warn coupled with said reporting letter constituted an invasion of privacy of Plaintiff.

43. That as a direct and proximate result of Defendant's conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

TENTH CAUSE OF ACTION

(Intentional Invasion of Privacy — failure to warn)

44. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, Paragraph 16, inclusive, of the THIRD CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION as if the same were separately set forth herein.

45. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION by intentionally failing to so warn the Plaintiff.

In addition, and because the Defendant intentionally failed to warn the Plaintiff aforesaid, Plaintiff made a disclosure to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosure Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Said intentional failure to warn coupled with said reporting letter constituted an intentional invasion of privacy of Plaintiff.

46. Defendant's intentional failure to warn, wrongful reporting and intentional invasion of privacy aforesaid was

malicious and fraudulent conduct intended to oppress the Plaintiff thereby entitling him to exemplary damages.

47. As a direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

ELEVENTH CAUSE OF ACTION

(Violation of Civil Rights — failure to warn)

48. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, Paragraphs 25 and 26, inclusive, of the FIFTH CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION, as if the same were separately set forth herein.

49. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had negligently breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION by negligently failing to so warn the Plaintiff.

In addition, and because the Defendant negligently failed to warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosures Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Said negligent failure to warn coupled with said reporting letter constituted a negligent violation of Plaintiff's civil rights.

50. That as a direct and proximate result of Defendant's conduct aforesaid, Plaintiff sustained the damages set forth

in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

TWELFTH CAUSE OF ACTION

(Intentional Violation of Civil Rights — failure to warn)

51. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, and Paragraphs 25 and 26, inclusive, of the FIFTH CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION, as if the same were separately set forth herein.

52. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION by negligently failing to so warn the Plaintiff.

In addition, and because the Defendant intentionally failed to warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosures Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Said intentional failure to warn coupled with said reporting letter constituted an intentional violation of Plaintiff's civil rights.

53. Defendant's intentional failure to warn, wrongful reporting and intentional violation of civil rights aforesaid was malicious and fraudulent conduct intended to oppress the Plaintiff thereby entitling him to exemplary damages.

54. As a direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the dam-

ages set forth in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

WHEREFORE, Plaintiff prays for damages as follows:

On the FIRST, THIRD, FIFTH, SEVENTH, NINTH and ELEVENTH CAUSES OF ACTION:

1. For general damages according to proof.

On each CAUSE OF ACTION:

2. For costs of suit; and

3. For such further relief as the Court may determine.

On the SECOND, FOURTH, SIXTH, EIGHTH, TENTH AND TWELFTH CAUSES OF ACTION:

4. For exemplary damages in the sum of $1,000,000.00.

On each CAUSE OF ACTION:

5. For costs of suit; and

6. For such further relief as the Court may determine.

DATED: June 29, 1981

/s/ S. Myron Klarfeld
S. MYRON KLARFELD
Attorney for Plaintiff

EXHIBIT B.

California Penal Code.

§ 11165. Definitions.

As used in this article . . .

(h) "Child care custodian" means a teacher, administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; a licensed day care worker; an administrator of a community care facility licensed to care for children; head-start teacher; a licensing worker or licensing evaluator; public assistance worker; employee of a child care institution including, but not limited to, foster parents, group home personnel and personnel of residential care facilities; a social worker or a probation officer.

(i) "Medical practitioner" means a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code.

(j) "Nonmedical practitioner" means a state or county public health employee who treats a minor for venereal disease or any other condition; a coroner; a paramedic; a marriage, family, or child counselor; or a religious practitioner who diagnoses, examines, or treats children. . . .